STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of A.L., K.L., J.L., and N. K., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SHIRLEY MICHELL,

Respondent-Appellant,

and

FRANZ KOEHLDORFER,

Respondent.

UNPUBLISHED
April 15, 2003

No. 240252
Shiawassee Circuit Court
Family Division
LC No. 99-009242-NA

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Respondent-appellant Shirley Michell (hereinafter "respondent") appeals as of right from the circuit court's order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(g). We affirm.

I

Respondent first contends that the circuit court erred in ordering termination of her parental rights on the basis of hearsay written reports concerning her mental condition, when petitioner failed to prove by legally admissible evidence at the adjudication phase of the proceedings the subsequent allegations, in the petition for termination, that respondent's mental condition precluded her from providing the children proper care and custody. "If termination is sought on the basis of one or more circumstances 'new or different' from those that led to the original assumption of jurisdiction, '[l]egally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights.'" *In re Gilliam*, 241 Mich App 133, 137; 613 NW2d 748 (2000), quoting MCR 5.974(E)(1).

We disagree with the circuit court's apparent conclusion that the termination petition did not contain new or different allegations than those that formed the basis for the initial petition for jurisdiction. MCR 5.974(E). Whereas the termination petition focuses exclusively on respondent's mental condition and alleged failures to progress in treatment, the petition seeking jurisdiction was based on different allegations of physical abuse and an unsuitable living environment, with no suggestion whatsoever that respondent's mental condition prevented her from caring for the children. Accordingly, at the dispositional hearing petitioner was required to establish the allegations within the termination petition by clear and convincing legally admissible evidence to warrant termination. MCR 5.974(E)(1).

Respondent received extensive treatment from various mental health service providers, eleven of whom testified at the termination hearing. Although the circuit court's opinion refers to written reports by several of these individuals, our review of the record reveals that all of the authors of the written reports offered live testimony at the hearing that echoed the information contained within their written reports. Further, the circuit court referenced in its opinion the properly admitted live hearing testimony of many other counselors and medical experts supportive of its decision.[1] Because the live, legally admissible testimony at the hearing encompassed all of the information in the reports to which the circuit court referred, we cannot conclude that the court's references to the reports were "inconsistent with substantial justice." MCR 2.613(A).

II

Respondent next argues that the circuit court erred in finding that clear and convincing evidence warranted termination of her parental rights pursuant to MCL 712A.19b(3)(g). We review for clear error a circuit court's decision that a statutory ground for termination of parental rights exists. MCR 5.974(I); *In re Trejo, Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The circuit court's findings of fact qualify as clearly erroneous when our review of the record reveals some evidence to support the findings, but leaves us with the definite and firm conviction that the circuit court made a mistake. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

The circuit court ordered termination of respondent's parental rights pursuant to MCL 712A.19b(3)(g), which authorizes termination under the following circumstances:

> The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

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[1] Although it appears clear in various portions of the transcript that many of the mental health care providers at times reviewed their written reports to assist their testimony, the circuit court properly permitted this practice pursuant to MRE 612, respondent made no objection throughout the lengthy hearing to any witness' consideration of a report, and the record reflects that respondent had copies of the various witnesses' reports from which to cross-examine the witnesses.

This statutory ground for termination requires clear and convincing evidence of both a failure and an inability to provide proper care and custody. *In re Hulbert*, 186 Mich App 600, 601, 605; 465 NW2d 36 (1990).

Clear and convincing evidence showed that respondent failed to provide the children with proper care and custody. Respondent involved herself in an abusive relationship with Franz Koehldorfer, who also physically abused the children. Respondent admitted the jurisdictional petition's allegations that: (1) Koehldorfer (a) assaulted her while the children were in the house, (b) threw K.L. down a flight of stairs, and (c) held the children upside down with respondent's knowledge and spanked them; and (2) respondent hit A.L. with a hanger. The testimony of respondent's sister and grandmother indicated that Koehldorfer frequently beat respondent, and on one occasion beat and bruised N.L., prompting respondent to keep her out of school for one week. The three eldest children testified: (1) that they often saw fighting and hitting between respondent and Koehldorfer, and sometimes attempted to intervene in the fights before retreating upstairs; and (2) that Koehldorfer also hit the children very hard and kicked them, which respondent knew but from which she could not protect them, despite her efforts to do so. Respondent's previous discipline of the children included slapping their mouths or hands, and spanking them with her hand, hangers or cords. A family therapist opined that the children likely had posttraumatic stress disorder.

None of the witnesses who testified during the twelve-day termination hearing disputed that respondent loved the children, had a high degree of motivation to win their return to her custody, and made progress with respect to the parent-agency agreement, including obtaining a personal protection order against Koehldorfer, completing parenting classes, obtaining a job, and repairing her fire-damaged house. However, clear and convincing evidence showed that after more than two years of participation in treatment, and the children's residency in foster care for nearly two and a half years, respondent remained unprepared to provide the children with proper care and custody.

The circuit court astutely observed that regardless of the many labels applied to respondent's mental condition during the lengthy termination hearing, the condition severely hindered her efforts to provide the children with proper care and custody. The family therapist who counseled respondent and the children over an extended period of time made the following significant observations: (1) despite occasional productive moments, the children often fought and acted out toward both the therapist and respondent; (2) the children consistently ignored respondent's best efforts at guidance, and even her minor instructions, because she acted more as a sibling toward them than as a parent, and failed to set appropriate boundaries or maintain a structured environment; (3) at the conclusion of family therapy, the therapist described the family as having severe levels of psychopathology, anger, denial, and impulsiveness; (4) by August 2001, respondent still had not improved her parenting skills; and (5) the therapist never observed respondent provide the children with proper care and custody, and disbelieved that, even in a "best case" scenario, respondent could so provide for even a normal child, let alone her four children with high emotional needs, absent at least two additional years of intensive therapy. The eldest child's counselor similarly opined that A.L. and respondent had a sibling-like relationship in which A.L. sometimes acted as a mother to respondent, who never provided A.L. with proper care or custody. The supervisor of most of respondent's visits from October 1999 to August 2001 observed that the children consistently acted out, behaved disrespectfully, fought

and misbehaved, and often ignored respondent's efforts to communicate with or discipline them. The supervisor further testified that respondent generally ignored her parenting advice, and opined that respondent had not significantly improved her parenting skills during the visitation period. A foster care worker explained that three separate periods of in-home visits between the children and respondent ended unsuccessfully, despite Families First assistance, because respondent felt overwhelmed by the children's ongoing misbehavior, and respondent traumatized K.L. by expressing her wish to die.

Additionally, the testimony of two psychologists, another counselor, and the foster care worker agreed that respondent had not provided the children with proper care or custody during the more than two years that she received treatment, and that respondent would need between two and a half to four years of intensive therapy to address her personality disorder and the childhood sexual abuse that continued to affect her life. Although the psychiatrist who had treated respondent since October 2001 believed that, through medication, respondent had significantly improved her ability to focus and had a fair to good prognosis with long-term adherence to medication and therapy, he had not evaluated respondent's parenting skills and could not estimate when respondent might provide proper care for the children. Even respondent herself, who expressed her readiness to take care of the children, indicated that she did not feel immediately prepared to handle all four children. This abundant evidence clearly and convincingly showed that, at the time of the termination hearing, respondent still was not able to provide the children with proper care and custody.

Further, the circuit court did not clearly err in determining that respondent could not improve her parenting skills within a reasonable time given the children's ages. *In re Terry*, 240 Mich App 14, 23; 610 NW2d 563 (2000); see also *In re Dahms*, 187 Mich App 644, 647-648; 468 NW2d 315 (1991) (indicating that a "reasonable time" should take into account both "how long it would take respondent to improve her parenting skills, [and] also on how long her . . . children could wait for this improvement"). The testimony of at least six counselors, psychologists, and therapists, established that the children had anxiety concerning their futures and high emotional and educational needs, felt a strong need for permanency and a sense of stability, and would suffer harm from a further period of uncertainty whether respondent might eventually and significantly improve her parenting skills.[2]

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[2] Respondent relies on *In re Boursaw*, 239 Mich App 161, 163-170 n 4; 607 NW2d 408 (1999), rev'd in part on other grounds in *In re Trejo Minors*, *supra* at 353, in which this Court reversed an order terminating the parental rights of a mother diagnosed with borderline personality disorder. This Court noted the respondent's love for the child and substantial success in accomplishing various treatment plan goals. *Id*. at 172-175. The Court concluded that clear and convincing evidence to warrant termination under MCL 712A.19b(3)(g) did not exist merely on the basis of one psychiatrist's uncertain testimony that the respondent might require four to six months to accomplish "serious work on dealing with her behavior as a parent," and another two to three years before the expert "could be confident that [the] respondent's positive behavior changes would endure." *Id*. at 172-173. Although this case also involves by all accounts a motivated respondent who loves her children and accomplished nearly all of her parent-agency treatment objectives, this case is distinguishable from *In re Boursaw*, because of the abundant evidence that, over a period of more than two years, which included counseling, parenting classes and in-home visits, respondent never demonstrated her ability to provide the children

(continued…)

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell

(…continued)

with proper care and custody. Further, unlike in *In re Boursaw*, *supra* at 175-176, the children here had high emotional needs and a strong need for a sense of stability after living in an abusive environment with respondent and Koehldorfer and spending two and a half years in foster care.

Although respondent does not specifically challenge the circuit court's finding that termination of her parental rights served the children's best interests, we note briefly that the court did not clearly err in this respect. MCL 712A.19b(5); *In re Trejo*, *supra*. No one disputed that respondent and the children loved each other, or that respondent made substantial efforts to improve her parenting skills. However, in light of the facts that (1) the children had resided in foster care for nearly two and a half years and needed permanency, (2) the children had high emotional needs, (3) respondent did not demonstrate during her participation in treatment her ability to provide the children with proper care, and (4) testimony showing that K.L. had made dramatic improvements in her behavior and education since residing in foster care, we are not left with the definite and firm conviction that the circuit court erred in finding that termination of respondent's parental rights furthered the children's best interests. *In re Conley*, *supra*.